

Dredge Operators, Inc. and Unlicensed Division of District No. 1 MEBA/NMU, AFL-CIO, National Marine Engineers Beneficial Association.
Case 16-RC-9388

March 30, 1992

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges to ballots in a mail ballot election held September 4, 1991,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 6 for and none against the Petitioner, with 14 challenged ballots, a sufficient number to affect the results.

The hearing officer has recommended that all the challenges be overruled. The Board has reviewed the record in light of the Employer's exceptions and the Petitioner's response. The Board adopts the hearing officer's findings² and recommendations, as discussed below.³

1. We affirm the hearing officer's finding that the 12 laid-off employees whose ballots were challenged had a reasonable expectancy of being recalled in the near future. Thus, they were temporarily laid-off employees, who were eligible to vote.⁴ Accordingly, we adopt the hearing officer's recommendation to overrule the challenges to the ballots of these 12 employees.⁵

¹ All dates are 1991. The ballots were mailed out on July 9 and were due back in the Board's Resident Office not later than August 6. They were opened and counted on September 4.

² The record establishes that the Employer applied for Hong Kong work permits for the laid-off employees in question on July 15 and August 6, rather than in late April or early May, as found by the hearing officer. Also, contrary to the hearing officer's finding, the record does not establish that the government of Hong Kong has granted final approval to the Employer's application for permanent work permits. Correction of these errors does not affect the result we reach in this case.

³ Member Oviatt previously voted to grant the Employer's request for review of the Regional Director's Decision and Direction of Election, and the Employer's subsequent request for reconsideration in this case. As the majority denied these requests, however, Member Oviatt joins his colleagues in considering the merits of the Employer's exceptions to the hearing officer's report on Challenged Ballots.

⁴ See generally *Apex Paper Box Co.*, 302 NLRB 67 (1991) (laid-off employees with a reasonable expectancy of recall in the near future are temporarily laid-off employees, who are therefore eligible to vote).

⁵ Carl Brown, Terrance Colgrove, Richard Gilpin, Thomas Hoagland, William Jacques, William Kincaid, Andrea Lewis, J.

2. The ballot of 1 of the above 12 employees, Stewart Stackhouse, along with the ballots of 2 additional voters, Tommy Keene and Daniel Ehinger, were challenged on the grounds that, because of resignation or promotion following the eligibility cutoff date, these 3 were no longer in the unit at the time of the election.

The hearing officer recommended that these challenges also be overruled. We adopt this recommendation for the following reasons, and with a qualification as to the ballot of Ehinger.

In mail ballot elections, individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board's designated office.⁶ Here, the mail ballots were due to be returned to the Resident Office not later than August 6.

Both Keene and Stackhouse were in temporary lay-off status, and thus in the unit, on the May 28 payroll eligibility cutoff date. The parties stipulated that Keene mailed his ballot to the Resident Office before he was recalled from layoff on August 5 to a *nonunit* job (licensed engineer) on the dredge.

As for Stackhouse, there is no assertion or evidence that his ballot was not received in the Resident Office by the August 6 deadline. Therefore, we infer and find that Stackhouse mailed his ballot on or before August 6. He subsequently resigned from employment on September 3, the day before the ballots were opened and counted. Thus, we find that Stackhouse, like Keene, mailed his ballot to the Resident Office while still on temporary layoff, prior to terminating his employment effective September 3.

Applying the above-cited rule to the facts of this case, we find that Keene and Stackhouse were eligible voters when they cast their ballots, because they were still in the unit as temporarily laid-off employees on the dates they mailed their respective ballots to the Resident Office. Accordingly, the challenges to their ballots are overruled.

Unlike Stackhouse and Keene, Daniel Ehinger was not in layoff status. Rather, he resigned from his unit job aboard the dredge on July 25. If his ballot was mailed while he was still a unit employee, i.e., on or before July 25, then he was an eligible voter when he cast his ballot, and the challenge to his ballot is overruled. Otherwise, the challenge to his ballot is sustained.

Porteous, Laura Rodriguez, Stewart Stackhouse, Jeffrey Terry, and Leonard Thigpen.

⁶ *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB 194, 195-196 (1976) (Winters and Hamblin); *Eck Miller Transportation Corp.*, 211 NLRB 251 fn. 2 (1974); *Plymouth Towing Co.*, 178 NLRB 651 (1969).

DIRECTION

The Regional Director for Region 16 shall, within 14 days from the date of this Decision, open and count all the challenged ballots, including the ballot of Dan-

iel Ehinger if it is postmarked on or before July 25. The Regional Director shall prepare, issue, and serve on the parties a revised tally of ballots and an appropriate certification.